Supreme Court, U.S.
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No. 98-569

In the

Supreme Court of the United States

OCTOBER TERM, 1998

AMSTERDAM VIDEO INC., *et al.*,

Petitioners,

vs.

THE CITY OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Of Counsel:
EUGENE GRESSMAN
Univ. of North Carolina
School of Law
Chapel Hill, NC 27599
(919) 962-3688

J. MICHAEL MURRAY
BERKMAN, GORDON,
MURRAY & DEVAN
2121 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

HERALD PRICE FAHRINGER
Counsel of Record
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA
110 East 59th Street
New York, New York 10022
(212) 909-9670

Counsel for Petitioners

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The Respondents' arguments that Petitioners are estopped or precluded from obtaining a federal court determination of their First Amendment free speech claims (1) add importance to the Questions Presented, and (2) add to the appropriateness of granting certiorari.

* * *

The main Questions in this case stem from the Second Circuit's failure to recognize the jurisdictional effects of a *Pullman* abstention order. By resort to the doctrine of collateral estoppel, or issue preclusion, the Second Circuit (1) has effectively restored state court jurisdiction to decide a First Amendment free speech claim, a jurisdiction that the *Pullman* order had reserved to the federal courts, and (2) has effectively precluded any attempt by Petitioners to seek this Court's review of the important First Amendment issues at stake in this case. These are propositions of the highest First Amendment importance, fully justifying the grant of certiorari. And by ignoring the jurisdictional aspects of the *Pullman* order, the Second Circuit has created an urgent need for this Court's guidance in administering the *Pullman* abstention doctrine.

The responses of the Respondents to this jurisdictional misadventure only add fuel to the certiorari flames:

First: Respondents' main claim is that the state courts, in determining the issues of fact and law necessary to resolve the free speech claim under the state constitution, employed the same fact inquiry and used the same standards that would be dispositive of a First Amendment free speech claim. Thus, the argument goes, a federal court may then exercise its retained jurisdiction over the First Amendment by resort to the collateral estoppel doctrine embodied in the federal full faith and credit statute. But is that method of exercising retained federal jurisdiction consistent with the purpose and the meaning of a *Pullman* abstention order? And is the Second Circuit's review of the state court findings of fact

merely to determine whether issue preclusion should apply consistent with that court's "appellate . . . obligation to 'make an independent examination of the whole record' to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression'"? *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

Second: Respondents press arguments that the state court proceedings respecting state constitutional issues preclude Petitioners from seeking or obtaining a federal court resolution of their First Amendment claim, even though the federal court had expressly retained jurisdiction to do just that. That proposition, if accepted, constitutes a significant and unprecedented event in the development of this Court's free speech jurisprudence. Respondents cite no First Amendment case, no First Amendment precedent, where a party has been precluded from seeking a federal court review of a First Amendment free speech claim, at least where the federal court has, or has retained, jurisdiction to do just that. If that is to be a part of First Amendment Law, this Court — not the Second Circuit — should so declare.

Third: While Respondents cite many precedents respecting the doctrines of collateral estoppel or issue preclusion, not one of them involve giving preclusive effect to a judgment by a court that had no jurisdiction over the matter at issue. Here, the state courts lacked any jurisdiction to decide the First Amendment claim. That jurisdiction had been specifically retained by the federal court in its *Pullman* abstention order. Here again, if that is to become a part of the federal law of issue preclusion, let it be declared by this Court, rather than by the silence of the Second Circuit.

Fourth: The Respondents assert that the "purported" *England* reservation that Petitioners filed in the state courts does not preclude application of the collateral estoppel doctrine. They argue that an *England* reservation is meaningful only where a party "invokes federal-court jurisdiction *in the first instance* on a federal claim," citing *Allen v. McCurry*, 449 U.S. 90, 101 n.17 (1980)(emphasis added). And since the Petitioners had originally filed both federal and state claims in a state court, only to have the entire case removed to federal court on Respondents' motion, the *England* reservation is said to be incapable of invoking federal jurisdiction to adjudicate the federal constitutional claims.

But the Petitioners ascribe no such jurisdictional qualities to their *England* reservation. The true jurisdiction dispensing event was the *Pullman* abstention order of the federal district court. That order specifically retained federal jurisdiction over the First Amendment claim, remanding to the state courts their jurisdiction over the state constitutional claims. Thus the *England* reservation was merely confirmatory of the earlier *Pullman* jurisdiction dispensing order. This Court should grant certiorari to clarify the jurisdictional aspects of the *Pullman-England* abstention doctrine.

Fifth: The Respondents make no effective response to the fact that Petitioners have been deprived of their right to seek certiorari review by this Court of their First Amendment free speech claims. The critical facts and analysis, we are told, took place in the state courts. And we are told that such First Amendment adjudication took the form of borrowing and using First Amendment standards in adjudicating free speech claims under the parallel free speech provisions of the New York state constitution. But since the state courts were only exercising jurisdiction over the state claims, consistent with the *Pullman* order, this Court would have had no jurisdiction to review such state constitutional determinations, no matter if federal standards were borrowed or used in making the determinations.

Here again, the guidance of this Court is urgently needed as to how to preserve this Court's ultimate jurisdiction over First Amendment claims — claims that were indirectly adjudicated by state courts and then buried in federal courts through invocation of the federal full faith and credit statute. Is it enough to say, as the Second Circuit said, that "the issues decided and the standards applied by the New York courts are the same as those that would be dispositive under the First Amendment"? Pet.App. A-29. And is it enough to say, as the Second Circuit said, that this Court "would remain free" to review the decision below only if the federal courts were mistaken in thinking that the state court determinations accurately mirrored federal free speech law? *Id.*

The severe and dire consequences of the Second Circuit's decision are being felt throughout New York and elsewhere. Recent newspaper articles report that scores of adult establishments have already been padlocked and many more have voluntarily censored their expression.[1] Similarly, it is a matter of public record that municipalities across the state and nation have patterned adult zoning ordinances based upon New York City's challenged Zoning Resolution. The considerable impact of the Second Circuit's decision on free expression and access to federal courts, as well as the inherent importance of the questions presented by this petition, warrant a full review of the case by the Court.

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[1] *See e.g.*, *Giuliani Vows More Closing of Sex Shops*, NEW YORK TIMES, Aug. 30, 1998 at B.33; CHRISTIAN SCIENCE MONITOR, Sept. 29, 1998 at 3 (21 of the businesses closed their doors and the City has tried to shutter another 29); NEW YORK TIMES, Oct. 18, 1998 at 39 (as of October 14, 1998, the total number of shops affected by the enforcement had risen to 59). More closure actions are being brought against bookstores and theaters each week.

CONCLUSION

For all the foregoing reasons, as well as those raised in the original petition, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

HERALD PRICE FAHRINGER
Counsel of Record
ERICA T. DUBNO
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY
& CAMBRIA
110 East 59th Street
New York, New York 10022
(212) 909-9670

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